JUL 6 1945

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 92

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SAMUEL J. FOLEY,
District Attorney, Bronx County,
State of New York,

By GEORGE TILZER,
Assistant District Attorney,
851 Grand Concourse,
New York, 51, N. Y.

INDEX

PAGE

Facts 2

The Question Presented 6

Preliminary Statement 6

The Question 8

The Relevant Statutes 8

POINT I—The decision of the Court of Appeals of the State of New York herein is not erroneous or in conflict with any decision of this Court 10

The report of the autopsy findings of the Medical Examiner is a public record 17

The Medical Examiner is not a part of the machinery of the prosecutor's office 24

POINT II—No constitutional right of the petitioner has been violated 24

POINT III—The *Slavski* Case 27

CONCLUSION 29

APPENDIX A—Opinion of the Appellate Division of the Supreme Court of the State of New York, First Department 31

APPENDIX B—Opinion of the Court of Appeals of the State of New York 46

CASES CITED

	PAGE
Chesapeake & D. Canal Co. v. U. S., 240 Fed. 903	12
Coleman v. Commonwealth, 25 Grattan 865	19
Commonwealth v. Slavski, 245 Mass. 405	27, 28
English v. Bohan, Matter of, 175 Misc. 930	22
Frank v. Mangum, 237 U. S. 309	25
Heike v. United States, 192 Fed. 83, aff'd 227 U. S. 131	14
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81	26
Palko v. Connecticut, 302 U. S. 319	26
People v. English, 175 Misc. 751	22
People v. Nisonoff, 267 App. Div. 356	2, 7, 29
People v. Nisonoff, 293 N. Y. 597	17
People v. Reese, 258 N. Y. 89	13, 19
People v. Russell, 21 P. (2d) 959	26
Powell v. Alabama, 287 U. S. 45	25
Richards v. Robin, 178 App. Div. 535	15, 27
Senior v. Boyle, Matter of, 221 N. Y. 414	23
State v. McO'Blenis, 24 Mo. 402	15
Todd v. State, 69 So. 325	11
Ziegler, Matter of, 122 Misc. 351	22, 23

STATUTES CITED

PAGE

New York City Administrative Code:
Section 878-3.0 9
Section 879-1.0 9

New York City Charter:
Section 874 8
Section 875 8
Section 879 ..... 9, 22

New York Civil Practice Act:
Section 367 ..... 9, 15, 27

New York Public Officers Law:
Section 10 10

OTHER AUTHORITIES

Chamberlayne, Modern Law on Evidence, Vol. 5:
Section 3424 13
Section 3425 13

Jones, Commentaries on Evidence, Vol. 4 (2d Ed.), Section 1700 13

12 Corpus Juris, Section 979 26

Wigmore on Evidence, Vol. V (3d Ed.):
Section 1397 10
Section 1630 19
Section 1420 20
Section 1632 21
Section 1634 22

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. .....

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

This is an application by the Petitioner, Joseph Nisonoff, for a *writ of certiorari* to review the decision of the Court of Appeals of the State of New York, rendered on December 30, 1944, affirming an order of the Appellate Division of the Supreme Court of the State of New York, First Department, which order affirmed a judgment of the County Court of the County of Bronx, in the State of New York, convicting the Petitioner, Joseph Nisonoff, and another physician, Max J. Weinstein, of the crime of Manslaughter in the First Degree.

A motion for a reargument of the decision, on the merits, was denied by an order of the Court of Appeals of the State of New York, made March 1, 1945.

Facts

The Appellate Division of the Supreme Court of the State of New York, First Department, in affirming the judgment of conviction of Manslaughter in the First Degree herein, rendered an opinion (267 App. Div. 356, 358-362) which sets forth the facts in detail as follows:

> "Appellants, who were licensed physicians, have been convicted of manslaughter in the first degree. The crime charged was that they performed an illegal abortion upon one Madylon McGeehan resulting in peritonitis from which she died. A review of the record satisfies us that the guilt of the defendants was established by the overwhelming weight of the evidence. The principal assignment of error upon this appeal is that these defendants were prejudiced at the trial by the receipt of incompetent evidence.
>
> * * * * * *
>
> We find that the evidence in controversy was largely cumulative, that the essential matters sought to be established thereby were amply proved by other testimony, and that the evidence complained of related largely to the cause of death which was not substantially disputed. We would be content to rest with this statement of our conclusions, but we deem that the novelty of the question of law raised justifies a more extended discussion of the case.
>
> It was established upon the trial by direct proof that Madylon McGeehan died on November 18, 1942, at a hospital in Bronx County. It was conceded that the deceased had been admitted to this hospital at the instance of defendant Nisonoff, who had been consulted by her as a physician as early as November 10, 1942. It was further conceded that decedent had originally consulted defendant Weinstein as a physician and that he had referred her to Nisonoff.
>
> On admission of Miss McGeehan to the hospital as his patient, Dr. Nisonoff signed a diagnosis showing that she was suffering from 'incomplete abortion, probably peritonitis.' Dr. Nisonoff made a like statement in a letter he sent to the Board of Health of the City of New York on November 16, 1942.

On November 18, 1942, and shortly after the death of the deceased, Dr. Nisonoff signed a death certificate reading as follows:

> 'I hereby certify that I attended the deceased from November 15, 1942, to November 18, 1942, and last saw her alive at 6 A. M. on November 18, 1942.
>
> Statement of cause of death is based upon—principal cause of death: general peritonitis. Date of onset: November 16th; contributory cause of death: incomplete abortion * * *.'

These documents, concededly executed by defendant Nisonoff, established that deceased had experienced an abortion and that she had died from general peritonitis following the abortion.

The contention of the defendants upon the trial was, in substance, that the deceased was suffering from an incomplete and inevitable abortion on November 13, 1942, and that they had treated her only in an effort to save her life. That this defense was false was amply established by testimony other than the testimony of which appellants now complain. Consciousness of guilt was established by proof of the conceded falsity of the statements first made by the defendants when they were questioned by the authorities concerning the girl's death and by proof that in their reports of the illness, treatment and death of deceased, they had made further false statements and had concealed material and incriminating facts.

The alleged error complained of consisted of the admission in evidence of a written report of the findings of an assistant medical examiner, one Dr. Louis L. Lefkowitz, who had performed an autopsy on the body of the deceased. Dr. Lefkowitz died before the trial. His report (other than his opinion as to the cause of death), which had been filed in the office of the Chief Medical Examiner of the City of New York pursuant to statute, was received in evidence over defendants' objection and exception.

Upon the facts disclosed in this report, another physician, Dr. Thomas A. Gonzales, Chief Medical Examiner of the City of New York, called as a witness for the People, was permitted to express an opinion that deceased had died of general peritonitis as the result of an incomplete abortion.

We find that the opinion rendered on the basis of the facts in the challenged autopsy report did little more than substantiate other proof, including statements of the defendants themselves, as to the cause of death. Defendants contend, however, that the autopsy report was hearsay; that its receipt was violative of their constitutional rights to be confronted by and to cross-examine the witnesses against them, and that this was prejudicial error requiring reversal of the judgment of conviction.

In order to review in its proper light the question thus raised, we deem it necessary to further detail the evidence in the case.

One Henry Elters, a resident of Hazleton, Pennsylvania, and concededly an accomplice in the crime charged, testified that he had arranged with defendant Weinstein, on or about October 15, 1942, to examine physically Madylon McGeehan. Miss McGeehan was then a resident of Washington, D. C., and came to New York a week later for the examination. Dr. Weinstein pronounced her pregnant. An abortion was then discussed over the telephone by Elters and Weinstein. The latter recommended a physician who was visited by the parties but who refused to participate in the case. Defendant Weinstein then arranged for a visit to defendant Nisonoff. After one futile attempt to contact the latter at his New York County office, Nisonoff was finally visited by deceased and Elters on November 10th at an office he maintained in Queens County. After examination, Dr. Nisonoff stated that Madylon McGeehan was pregnant. He testified that on this visit he found her condition such that he advised her that she could complete a normal pregnancy.

Witnesses for the People stated that deceased expressed reluctance to have an abortion performed on this occasion. However, several days later, and on November 13, 1942, she returned to the Queens office of Dr. Nisonoff with Elters and Weinstein, after Weinstein had arranged for the visit.

Dr. Nisonoff testified that on an examination made on this day he found a marked change in her condition since the visit of the 10th and that a condition of inevitable abortion had developed.

There was contrary testimony given on the trial by one Camille Ewald, Dr. Nisonoff's nurse, also an accomplice, who testified for the People. She related circumstances in connection with the preparation of the deceased for the operation performed on the 13th which tended to show that deceased was in a normal state of pregnancy on that date.

Testimony was also given by a physician practicing in Washington, D. C., to the effect that he had examined deceased on October 23, 1942, and had found her pregnant and her condition good. As against this, there was some evidence that deceased had related to Elters, between October 15th and October 23rd, that she had suffered some bleeding; and there was further evidence that she had been nauseated on the way over to Dr. Nisonoff's office on November 13th.

* * * * * *

Concededly, on November 13, 1942, a fee of $600 was arranged and paid over to defendants, and an operation was commenced by Dr. Nisonoff on that date. The details of what occurred were testified to by Miss Ewald, as well as by the defendants. She stated that in the course of the operation there was a sudden spurting of blood which struck the doctor's glasses; that he expressed concern over what had happened and thereupon stopped the operation. The doctor requested Miss Ewald to take the patient to her (Miss Ewald's) apartment nearby. The patient remained there until November 15th, when Dr. Nisonoff caused her to be removed to the hospital in the Bronx where she later died. During the time that the patient was at the nurse's home, Dr. Nisonoff visited her several times. On one occasion he prepared a prescription for certain medicine for her, but instead of inserting the patient's name, he inserted the name of the nurse, Ewald, and used the nurse's age, thus evidencing an intention to conceal the treatment undertaken.

We have already noted that Dr. Nisonoff prepared a diagnosis report on November 15th and issued a letter to the Board of Health on November 16th. In neither of these documents did he state anything concerning earlier treatment by him. In the letter of the 16th, he stated that his patient had denied any criminal

interference with her pregnancy, although his testimony indicated that he had found interference.

It will also be noted that in the death certificate Dr. Nisonoff stated that he had only been in attendance on the patient from November 15, 1942, thus concealing what had occurred as to the examination and operation by him prior to the 15th. In addition, there was considerable testimony showing that both Weinstein and Nisonoff had requested Elters and Ewald, if questioned by the authorities, to omit any mention of defendants' connection with the case prior to November 15th.

The defendants, when questioned by the authorities, had both stated that their connection with the case had commenced on the 15th and had further stated that the patient had been taken from Dr. Weinstein's office in the Bronx to the hospital in a taxicab, whereas in fact she had come from Miss Ewald's home in Queens in an ambulance.

Defendants admitted on the trial that these statements to the authorities were false. Their only excuse for making false statements was, in effect, that they had done so at the suggestion of the nurse, Ewald, and to save her from embarrassment in some investigation to which she was being subjected" (fols. 2977-2996).

The Question Presented

Preliminary Statement

Shortly before the trial herein, the Assistant Medical Examiner, Dr. Louis L. Lefkowitz, who had performed the autopsy upon the deceased, Madylon McGeehan, died.

By reason of his death, the prosecution was unable to establish the cause of death by the testimony of the Assistant Medical Examiner who, ordinarily, would be called to testify to his autopsy findings, and to express an opinion as to the cause of death.

Instead, the prosecution, after preliminary proof as to its authenticity, offered, in evidence, the original autopsy findings, signed by the Assistant Medical Examiner, Dr.

Lefkowitz, and filed by him, in the office of the Chief Medical Examiner, *eliminating therefrom his opinion as to the cause of death.*

The Chief Medical Examiner was then called as a witness, and expressed an opinion as to the cause of death, based upon these autopsy findings.

As indicated in the opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, a copy of which is set forth herein, as Appendix A,

> "• • • • *All parties agreed that peritonitis had been the cause of death.*
>
> • • • • • • •
>
> *Nor was the autopsy report offered as the sole proof of the facts of death or of the cause thereof.* • • •." (Italics ours.)
>
> *People* v. *Nisonoff*, 267 App. Div. 356, 365.

It was generally agreed, upon the trial, that the deceased died of peritonitis caused by an incomplete abortion (fols. 257-258, 281-282, 295-296, 1958-1960, 1965-1966; People's Exhibit 8, fols. 1167-1168, 1172-1173; People's Exhibit 6, fols. 1273-1275; People's Exhibit 7, fols. 1447-1448, 2344-2355).

Dr. Nisonoff, the petitioner herein, when testifying in his own behalf, repeatedly stated that the deceased had been tampered with before she came to see him; that her pregnancy had been interfered with, and that she was suffering from an incomplete abortion which resulted in a general peritonitis causing her death (fols. 1529-1531, 1550, 1565-1566, 1578-1579, 1585, 1589, 1590, 1596-1598, 1644, 1662, 1671, 1674, 1686, 1718, 1741, 1742, 1746-1747, 1751, 1868, 1878-1879, 1909-1910, 1915, 1917, 1925).

Two experts, called as witnesses by petitioner, testified, in response to hypothetical questions, that the deceased was suffering from an inevitable or incomplete abortion (fols. 2254-2255, 2288-2298).

The sole important issue litigated upon the trial was whether or not the petitioner and his co-defendant had performed the illegal abortion which resulted in the death of the deceased.

The Question

Did the admission into evidence of the report of the deceased Medical Examiner of the City of New York of his findings during the autopsy performed upon the body of Madylon McGeehan, as a basis for an expert opinion as to the cause of death of the said Madylon McGeehan, violate the Petitioner's right of confrontation and the "Due Process Clause" of the Fourteenth Amendment to the Constitution of the United States?

The Relevant Statutes

The Office of Medical Examiner of the City of New York is provided for by Section 874 of the New York City Charter. This section reads, in part, as follows:

> "There shall be the office of chief medical examiner the head of which shall be the chief medical examiner *who shall be appointed* by the mayor *from the classified civil service and be a doctor of medicine and a skilled pathologist and microscopist* • • •." (Italics ours.)

Provision for the appointment of Assistant Medical Examiners is found in Section 875 of the New York City Charter, which reads as follows:

> "The chief medical examiner may appoint and remove such deputies, assistant medical examiners, scientific experts and other officers and employees as may be provided for in the budget. The deputy medical examiners and assistant medical examiners shall possess the same qualifications as the chief medical examiner."

Section 879 of the New York City Charter provides:

> "It shall be the duty of the Chief Medical Examiner to keep full and complete records in such form as may be provided by law. The Chief Medical Examiner shall promptly deliver to the appropriate District Attorney copies of all records relating to every death as to where there is, in the judgment of the Medical Examiner in Charge, any indication of criminality, and such records shall not be open to public inspection."

Section 878-3.0 of the Administrative Code of the City of New York provides:

> "Q. If the cause of such death shall be established beyond a reasonable doubt, the medical examiner in charge shall so report to his office. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner. A detailed description of the findings *written during the progress of such autopsy* and the conclusions drawn therefrom shall thereupon be filed in his office." (Italics ours.)

Section 879-1.0 of the Administrative Code provides:

> "Records shall be kept in the office of the chief medical examiner, properly indexed, stating the name, if known, of every person dying under the circumstances described in section eight hundred seventy-eight of the charter, the place where the body was found and the date of death. To the record of each case shall be attached the original report of the medical examiner and *the detailed findings of the autopsy,* if any. The appropriate district attorney and the police commissioner of the city may require from the chief medical examiner such further records, and such daily information as they may deem necessary." (Italics ours.)

The Civil Practice Act of the State of New York, section 367, provides:

> "Certificate of officer as evidence of facts. Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit

> touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the State; the certificate or affidavit so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, except where the effect thereof is declared or regulated by special provision of law."

Section 10 of the Public Officers Law of the State of New York provides that a public officer shall take an oath before entering upon the duties of his office.

POINT I

The decision of the Court of Appeals of the State of New York herein is not erroneous or in conflict with any decision of this Court.

The petitioner contends that, by the introduction in evidence of the report of the autopsy findings of the deceased medical examiner, he was denied his constitutional right to be confronted by the witness, and further contends that he was, thereby, denied the right of cross-examination.

The right of confrontation imports and confers the right of cross-examination.

> "There never was at common law any recognized right to an indispensable thing called Confrontation as distinguished *from Cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. * * *"
>
> *Wigmore on Evidence,* Vol. V (3d Ed.), Sec. 1397, pp. 128-129.

Wigmore in his treatise on Evidence (Vol. 5, 3d Ed., Sec. 1397), pages 130, 131, discussing exceptions to the rule of confrontation and the hearsay rule says:

"Moreover, this right of cross-examination thus secured was *not a right devoid of exceptions.* The right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination (ante, Sec. 1362). Now the Hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to be developed in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not attempt to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended, * * *."

In *Todd* v. *State* (69 So. 325), at page 327, the Court of Appeals of Alabama said:

"* * * It is thoroughly settled and familiar that there are well-known and generally recognized exceptions to the rule grounded on constitutional guaranty that the accused has the right to be confronted with the witnesses against him. These exceptions find support in and are based upon principles of public policy, expediency or necessity. * * *"

And at page 328, that Court further said as follows:

"The constitutional rule of confrontation is but a sanction or guaranty of the right recognized under the common law, and is subject to the same exceptions as then existed, and those that may be legitimately found to exist, developed or created in the future in consonance with the progress of human affairs through necessity, expediency, or public policy. Other exceptions that may be made are but the necessary application of old rules to the new order of things and new conditions. The federal Constitution, and the constitutions of most, if not all, of the states, contain similar provision to our Constitution in this particular, and it has been almost universally recognized in all jurisdictions, both federal and state, that the rule is not

impaired by, nor does it apply or extend to, documentary proofs or record evidence. 2 Bishop's New Criminal Procedure, Section 1134, and footnote citing numerous authorities; 12 Cyc. 543 (b); 8 Ency. Ev. 471 (b); 10 Ency. Ev. 880 (1); 14 Ency. Ev. 581 (5)."

In *Chesapeake & D. Canal Co.* v. *U. S.* (240 Fed. 903), at page 907, the Court said:

"* * * We understand the general rule to be that when a public officer is required, either by statute or by the nature of his duty to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. *As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath,* they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are 'prima facie' evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. *As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage.* * * *" (Italics ours.)

One of the well recognized exceptions to the hearsay rule, at common law, is the admissibility of records made by public officers, in the course of their official duty, or pursuant to statutory mandate.

The rule, in respect to records made by public officers in the course of the performance of their official duties, or pursuant to statutory requirement, is stated in 23 C. J. S., Section 844, page 30, as follows:

"All public records which are by law required to be kept for the purpose of preserving evidence of

transactions and occurrences for public uses are competent to establish such transactions or occurrences when they are material in a criminal prosecution. * * *"

Chamberlayne in his Modern Law on Evidence (Vol. 5, Sec. 3424, pp. 4714 and 4715) lays down the rule as follows:

"Records made by pubic officers in the course of their official duty under a law which requires the keeping of such records or which are required by the nature of the office are ordinarily admissible as prima facie though not conclusive evidence of the facts which they assert. It is not essential to their admissibility that a statute require that they be kept, it being sufficient if necessary to keep them in the discharge of a public duty. * * *"

And in Section 3425, at page 4716, the following is stated:

"A record to be admissible as a public record should be intended as a mode of preserving the recollection of the facts. * * *"

In Jones, Commentaries on Evidence (Vol. 4 [2nd ed.], Sec. 1700, pp. 3117, 3118) the rule is thus stated:

"When persons in public office are required by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties and under their personal observation, such records are usually admissible as substantive evidence. *When such entries are made by authorized public agents in the course of public duty, and relate to matters in which the whole public may be interested, the circumstances are deemed sufficient sanctions to dispense with the necessity of an oath and cross-examination.* * * *" (Italics ours.)

Judge Cardozo, in *People* v. *Reese* (258 N. Y. 89, at p. 96), said:

"* * * The rule of confrontation * * * has never been deemed to require the exclusion of certificates or records made by a public officer in the course of his official duty. * * *"

In *Heike* v. *United States* (192 Fed. 83, aff'd 227 U. S. 131) the Court discusses the admissibility of records made by public officers, in the course of their official duties or pursuant to statute. At page 94, the Court said as follows:

"It is contended that there was error in admitting certain dock books of the assistant United States weighers. In these were recorded by such assistant weighers the results of their observations of the scales, made at the time of weighing. These were official records of the government and produced from its files. Such records are not covered by the hearsay rule. It is elementary that they are *prima facie* evidence of what they purport to record.

In support of the defendants' contention reference is made to Section 1 of article 6 of the amendments of the Constitution of the United States, which provides that:

'In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.'

The scope of that provision was fully discussed by the Supreme Court in Mattox v. U. S., 156 U. S. 237, * * * where exception was reserved to the introduction of the stenographic report of the testimony of a deceased person given on a former trial. In overruling this exception the court said:

'We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject * * * such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions, in the nature of a bill of rights, are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be re-

spected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused. They are made without any opportunity for examination or cross-examination. Nor is the witness brought face to face with the jury. Yet from time immemorial they have been treated as competent, and no one would have the hardihood at this day to question their admissibility.' "

In *State* v. *McO'Blenis* (24 Mo. 402, at p. 416) the Court, speaking of the right of confrontation, said:

" • • • The purpose of the people was not, we think, to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land from future change by elevating them into constitutional law. It may as well be the boast of an Englishman living under the common law, as of a citizen of this state living under our Constitution, that in a criminal prosecution he has a right to meet the witnesses against him face to face; and yet it was never supposed in England, at any time, that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness, under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the general rule. • • • "

This exception, in favor of records of public officers was recognized at common law, and in the State of New York has been incorporated into the Civil Practice Act of the State of New York by Section 367 (formerly Section 922 of the Code of Civil Procedure of the State of New York).

Thus, in *Richards* v. *Robin* (178 App. Div. 535) which involved the liquidation of the affairs of a bank by the

Superintendent of Banks, it was held that an inventory of assets and list of claims filed in the office of the Clerk of the County of New York, by the State Superintendent of Banks, pursuant to the requirements of the Banking Law, was by virtue of Section 922 of the Code of Civil Procedure (present Section 367 of the Civil Practice Act) properly admitted in evidence, and was sufficient to establish a prima facie case of insolvency. At page 539, the Court said:

> "* * * It may be noted that this section (sec. 922 Code Civ. Pro., present sec. 367 Civ. Prac. Act) incorporates into the Code a portion of the broader common law rule that an official statement kept or prepared by or under the direction of a public officer, acting under his oath of office, either pursuant to a positive requirement of statute or in the discharge of a public duty, is competent prima facie evidence as against all the world of such facts therein stated as the official was required or authorized by law to state (3 Wigm. Ev. Sec. 1630 et seq.; Saranac Land & Timber Co. v. Roberts, 208 N. Y. 288, 299; Board of Water Comrs. of Cohoes v. Lansing, 45 id. 19; People ex rel. Stone v. Minck, 21 id. 539; Evanston v. Gunn, 99 U. S. 660; Gaines v. Relf, 12 How. (U. S.) 472, 570). * * *" (Words in parentheses ours.)

In its opinion herein, the Court of Appeals of the State of New York also recognized the existence at common law of such an exception in favor of records made by public officers.

Speaking of the right of confrontation, the Court of Appeals of the State of New York, in the instant case said:

> "The right of confrontation imports and confers the right of cross-examination. When that right was added to our State Constitution, there was eliminated the possibility of its deprivation by legislative act. When we interpret that addition to the Constitution, we must do so in the light of the law as it existed at the time of the change. Any exceptions to the right

of confrontation or cross-examination existing prior to the adoption of the State constitutional provision and not contrary to its spirit, must be respected. (Mattox v. United States, 156 U. S. 237, 243.) In that case, speaking of the Constitution of the United States, the court used the following language (p. 243), which is particularly applicable here: 'We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizens, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.'

The right of an accused in a criminal action to be confronted by the witnesses who testify against him, is not violated by the introduction of so-called public documents or official records required to be kept. (Heike v. United States, 192 F. 83, 94, 95, aff'd 227 U. S. 131; Commonwealth v. Slavski, 245 Mass. 405, 414, 415, 417; People v. Reese (1932), 258 N. Y. 89, 96; People v. Corey, 157 N. Y. 332; 5 Wigmore on Evidence, Section 1398, pp. 136, 141, 142; Richardson on Evidence (6th ed.), Sections 615, 616, 646, 647.)"

People v. *Nisonoff*, 293 N. Y. 597, 601-602.

The report of the autopsy findings of the Medical Examiner is a public record

The petitioner argues that the autopsy report is not a public record because it is not open to public inspection.

He stresses the fact that by reason of the provisions of Section 879 of the New York City charter, the autopsy findings were not open to public inspection and, therefore, were inadmissible in evidence as a public record.

The petitioner intimates that the right of public inspection assures the accuracy and trustworthiness of a record.

It is respectfully submitted however, that not one iota would have been added to the accuracy and trustworthiness of the autopsy findings, even if the autopsy report were open to public inspection.

It will be recalled that an assistant medical examiner is required, by statute, to be a skilled pathologist, microscopist, and a doctor of medicine.

What Dr. Lefkowitz, the medical examiner, recorded were the physical facts which he observed, and which would not have been differently recorded, if observed by any other skilled pathologist, microscopist and doctor of medicine.

The accuracy and trustworthiness of the autopsy findings stem from the fact that it was made by a public officer, whose qualifications were prescribed by statute. It was made and filed pursuant to statutory mandate, by one who had taken an oath of office, and personally observed the facts which he recorded. He was indifferent to the matter. He had no personal interest and no motive whatsoever to record anything but what he personally observed.

It is respectfully submitted that the term "public record" should not be given the narrow construction sought to be given it by the petitioner.

The word "public" connotes more than the mere right of inspection by the public.

The autopsy report in question was made by a public officer, for public purposes and not for private purposes. It is a record belonging to the public, and not to the individual who made it. It is this that gives it a public character and makes it a public record.

A public record is not necessarily one open to public inspection, but rather one made for public purposes, by a public officer, pursuant to statute, or by reason of the duties of his office.

It is significant that Judge Cardozo, in *People* v. *Reese*, supra, speaking of the rule of confrontation and its exceptions, does not speak of a public record but rather of a record made by a public officer.

In *Coleman* v. *Commonwealth* (25 Grattan 865, at pp. 881-882) the Court said:

> "• • • Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer; is the property of the State and not of the citizen, and is in no sense a private memorandum."

Wigmore, discussing the exception to the hearsay rule in favor of records of public officers says:

> "The scope of this exception is often designated by the term 'public documents'.
>
> But this term is inadequate and misleading: In the first place the word '*public*' is ambiguous. It may signify 'open to all,' 'capable of being known or observed by all'; or it may signify 'having an interest for persons in general'; or it may signify 'made or done by an officer of the government'. • • •
>
> So far as the term may indicate a general principle, it is obvious that the principle may result in different rules according to the sense in which the word 'public' is to be interpreted. This ambiguity of phrase has already caused an undesirable uncertainty in the scope of the exception; and it is better to avoid a confusing terminology. The word 'official' more accurately signifies the essence of the principle dominating the exception."
>
> • • • • • •
>
> "For these reasons, the term 'Official Statements' seems preferable as a designation of the present exception to the hearsay rule."
>
> Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1630, pp. 512-513.

The petitioner urges that he was denied the right of cross-examination.

Wigmore, in discussing the value of cross-examination, as a means of testing credibility, points out that in the case of records made by public officers, since the presumption is that a public officer does his duty, and since the probability is that he makes a correct statement, this presumption and probability take the place of cross-examination. Thus, he says:

> "* * * The theory of the hearsay rule * * * is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. * * *". Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1420, p. 202.

Wigmore, speaking of the principle of circumstantial probability of trustworthiness, says:

> "Two reasons are judicially sanctioned as justifying the present exception in this respect. The second is of modern English suggestion, and has not received recognition in the United States. * * *"
>
> "(1) The first reason is related in its thought to the presumption that public officers do their duty. When it is a part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. * * *
>
> The fundamental circumstance is that an official duty exists to make an accurate statement, and this special and weighty duty will usually suffice as a motive to incite the officer to its fulfillment. * * * It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement."
>
> * * * * * * *

"(2) It has also been suggested by some English judges that a second circumstance forms an essential part of the sanction for receiving such hearsay statements, namely, the circumstance of *publicity*. * * * Where an official record is one necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected furnishes a special and additional guarantee of accuracy. * * *"

Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1632, pp. 514-516.

This requirement of publicity was expounded as an essential one by Lord Blackburn, in the case of *Sturla* v. *Freccia* (L. R. 5 App. Cas. 623), cited by the petitioner.

Wigmore, in commenting upon the reason advanced by Lord Blackburn for the requirement of publicity, says:

"This reasoning is plausible, and does, no doubt, add to many official documents a special measure of trustworthiness. But it should not be regarded as justifying a definite limitation of the scope of the exception; for its strict application would exclude many classes of official documents which are in fact admitted and ought in reason to be admitted. * * * It can hardly be supposed that this bare possibility of inspection can have any appreciable subjective influence upon the officer. * * *

It would seem that this second reason, put forward so definitely by Lord Blackburn, is to be regarded as merely a casual advantage, and not an essential limitation, * * *."

Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1632, pp. 516-517.

Wigmore points out that the requirement of publicity seems to be the present law of England, but is not the law of the United States.

Thus, Wigmore says:

"In the United States no definite acceptance of this limitation seems to have been made; although in a few

opinions the element of publicity has been referred to 'obiter' as essential."

"For the reasons already indicated • • • the limitation is not a desirable one. • • • "

Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1634 p. 525.

The case of *Sturla* v. *Freccia*, supra, is not analogous to the instant case.

In *Sturla* v. *Freccia*, the document which was held to be inadmissible was a report of certain persons, who had conducted a certain investigation which involved the making of inquiries and the searching of records.

Clearly, the situation in that case is wholly unlike the situation in the case at bar. In the instant case, the report of the autopsy findings was not the result of an investigation which involved the questioning of persons and the searching of records, but was the report of physical facts personally observed by one qualified to make the observations.

It is respectfully submitted, therefore, that under the common law and by virtue of the provisions of section 367 of the Civil Practice Act of the State of New York, the report of the autopsy findings of the Medical Examiner is a public record, which is admissible in evidence, notwithstanding the right of confrontation.

In support of his contention that the report of the autopsy findings is not a public record, the petitioner relies upon the cases of *People* v. *English* (175 Misc. 751), *Matter of English* v. *Bohan* (175 Misc. 930), and *Matter of Ziegler* (122 Misc. 351). These cases are not authority for the contention of the petitioner.

The cases of *People* v. *English*, and *Matter of English* v. *Bohan*, supra, involve applications for leave to inspect autopsy reports. The applications were denied by reason of Section 879 of the New York City Charter, which provides that autopsy reports shall not be opened to public inspection where there is any indication of criminality.

The case of *Matter of Ziegler,* supra, involved an application to inspect reports of the police department, and it was held that such reports were of a confidential nature and not open to public inspection.

Insofar as these three cases speak of the autopsy report of a medical examiner as not being a public record, they must be deemed to have been overruled by the decision of the Court of Appeals in the case at bar.

The petitioner seeks to draw an analogy between the reports of coroners' inquests and the report of the autopsy findings of the Medical Examiner herein. He urges that the reports of coroners' inquests have been held to be hearsay and inadmissible as evidence.

The fundamental basis for the exclusion of a coroner's inquest is that such inquest involves an inquiry and investigation, upon which witnesses are sworn, examined and cross-examined, and involves an appraisal of the credibility of such witnesses. It is not the result, solely, of personal observation of physical facts, as in the case of the report of the autopsy findings of a medical examiner.

As was said in *Matter of Senior* v. *Boyle* (221 N. Y. 414, 417):

> "• • • But the characteristic features of the office and power of a coroner (Code of Crim. Pro. Secs. 773-790) are not retained. The chief medical examiner acts without a jury, holds no inquest, renders no decision, holds no one to answer, issues no warrant of arrest. The ancient office is gone and the ancient duties have largely disappeared with it. Another method of investigating suspicious deaths has supplanted crowner's quest • • •."

So that, there is no analogy between a coroner's inquest and the report of the autopsy findings of a medical examiner.

The Medical Examiner is not a part of the machinery of the prosecutor's office

The petitioner seeks to create the impression that the Medical Examiner's office is a part of the machinery of the prosecutor's office. He intimates that prosecutors frequently act in a partisan manner and, therefore, the autopsy report of a medical examiner is untrustworthy. There is no basis for this contention.

The Medical Examiner's office is entirely distinct and separate from the prosecutor's office. The employees of the Medical Examiner's office, including the Assistant Medical Examiners, are under the exclusive control and direction of the Chief Medical Examiner, by whom they are appointed from Civil Service lists. They are, in no way, subject to the orders of the prosecutor, and he has no supervision over them, directly or indirectly.

It is significant that at no time, either upon the trial, or upon the appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, and to the Court of Appeals of the State of New York, was it suggested that the Medical Examiner's office was a part of the machinery of the prosecutor's office or that the Medical Examiner who performed the autopsy upon the body of the deceased, Madylon McGeehan, had any interest whatsoever in the prosecution of the petitioner.

POINT II

No constitutional right of the petitioner has been violated.

The petitioner asserts that, by the introduction in evidence of the autopsy report of the findings of the Medical Examiner, there has been a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

He urges that the right of confrontation, which is guaranteed to the citizens of the United States, in the Federal Courts, under the Sixth Amendment to the Constitution of the United States, is guaranteed to the citizens of the States, by virtue of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In support of his contention, he cites numerous cases, none of which passes upon the question involved herein.

The cases cited by the petitioner are those in which the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States was held to have been violated, because confessions, obtained by the use of force, violence and coercion, were received in evidence against the accused, and because the accused were denied the right of counsel.

What constitutes "due process of law" has been enunciated in the case of *Frank* v. *Mangum* (237 U. S. 309, at p. 326) as follows:

> "As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the Courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a Court of competent jurisdiction, according to established modes of procedure, is 'due process' in the Constitutional sense. * * * "

And in the case of *Powell* v. *Alabama* (287 U. S. 45, at p. 65) this Court said:

> "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common law and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil

and political conditions of our ancestors by having been followed in this country after it became a nation. * * *"

In the case at bar, the petitioner had a fair and impartial trial, before an unbiased judge, and a jury of his own selection, according to established modes of procedure. He had ample time to prepare his defense, and to present it in its most favorable aspect to a jury. He was, at all times, represented by able and experienced counsel.

The argument of the petitioner that the admission in evidence of the report of the autopsy findings of the Medical Examiner deprived him of a fundamental right, because it deprived him of the right of confrontation, and the right of cross-examination is without merit.

The right of the petitioner to be confronted by the Medical Examiner is "not of the very essence of a scheme of ordered liberty". The denial of that right does not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamenetal".

Palko v. *Connecticut*, 302 U. S. 319, 325.

Accordingly, it has been held that a statute making certain records evidence of a prior conviction, did not violate the due process clauses of State and Federal Constitutions.

People v. *Russell* (21 P. [2d] 959).

This Court, in the case of *Lindsley* v. *Natural Carbonic Gas Co.* (220 U. S. 61, 81), has held that:

"Each State possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts * * *."

In 12 C. J., Section 979, at pages 1205-1206, the rule is stated as follows:

"Generally speaking, the legislature may, without denial of due process of law, establish and alter the

rules relating to the admission and effect of evidence in criminal cases; and the same is true as to the powers of Congress in prescribing rules of evidence for trials in the Federal Courts. If the rule of evidence prescribed by statute is reasonable in itself, and does not deprive the accused person of reasonable opportunity to make his defense or to give in evidence all the facts relating to the issue, it is due process of law within the constitutional guarantees."

We have heretofore shown that the report of the autopsy findings of the Medical Examiner is a report filed in a public office, by a public officer, for a public purpose, embodying facts required by statute to be stated therein.

Such a record of a public officer was admissible at common law, prior to the adoption of the Constitution of the United States, and is also made admissible in evidence by *Section 367 of the Civil Practice Act of the State of New York, which incorporates into the statute "a portion of the broader common law rule that an official statement kept or prepared by or under the direction of a public officer, acting under his oath of office, either pursuant to a positive requirement of statute or in the discharge of a public duty, is competent prima facie evidence as against all the world of such facts therein stated as the official was required or authorized by law to state."*

Richardson v. *Robin*, 178 App. Div. 535, 539.

POINT III

The *Slavski* Case.

The petitioner, recognizing the applicability, to the case at bar, of the case of *Commonwealth* v. *Slavski* (245 Mass. 405), cited by the Court of Appeals of the State of New York, in its opinion herein, attempts to differentiate that case from the case at bar.

The *Slavski* case involved an alleged illegal sale of liquor.

A statute of the State of Massachusetts permitted the receipt in evidence of an analysis by a State chemist showing the alcoholic content of a certain beverage.

It was also provided by Article 12 of the Declaration of Rights of the State of Massachusetts that in a prosecution for crime "every subject shall have a right * * * to meet the witnesses against him face to face".

The accused in the *Slavski* case contended that he was denied the right to be confronted by the witnesses against him, because of the introduction in evidence of the report of a State chemist setting forth an analysis of the alcoholic content of the beverage in question.

The Court, in that case, overruled that contention, and in its opinion pointed out that such a record was admissible at common law.

Thus, the Court in *People* v. *Slavski,* supra, at page 415, said:

> "One of the acknowledged exceptions to the face to face rule of evidence is that public records are competent evidence when of probative value respecting an issuable fact. That is an ancient principle of the common law, recognized at the time of the adoption of the Constitution. Wigmore on Ev. Secs. 1395-1398. It cannot be thought that the Constitution was intended to close the door to the legislative department of government to establish new public records with like probative value. Existing public records did not become rigid for all time for evidential purposes. Power to add to the varieties of public records under the principles of law prevailing at the time of the adoption of the Constitution is conferred upon the General Court under the grant to make, ordain and establish all manner of wholesome and reasonable laws not repugnant to the Constitution. There is analogy in this respect to the trial by jury preserved in all its essentials by the Constitution, which may be regulated by the Legislature as to details not impairing its essential integrity. * * *"

Similarly, in the case at bar, there was received in evidence the record of a public officer, made pursuant to statu-

tory mandate, which record was a statement of autopsy findings.

It will be noted that, in the case at bar, so much of the report of the autopsy findings, filed by the Medical Examiner, as sets forth his conclusion or opinion as to the cause of death, was eliminated from the report as offered in evidence.

As was stated by the Appellate Division of the Supreme Court of the State of New York, First Department, in its opinion, affirming the judgment of conviction of the petitioner:

> "An autopsy made by a skilled pathologist in the performance of his official duties showing primary facts found creates little risk of inaccuracy and would seem to be in that class of public records usually deemed admissible as such."

People v. *Nisonoff*, 267 App. Div. 356, 370.

CONCLUSION

It is respectfully submitted that there has been no violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and, accordingly, the application for a writ of certiorari should be denied.

Dated: New York, June 30, 1945.

Respectfully submitted,

SAMUEL J. FOLEY,
District Attorney, Bronx County,
State of New York,

By GEORGE TILZER,
Assistant District Attorney,
851 Grand Concourse,
New York, 51, N. Y.

APPENDIX

END OF

A CASE